UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

HENDRICKSON TRUCKING COMPANY, *Petitioner/Cross-Respondent,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent/Cross-Petitioner.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT), Local 1038, *Intervenor.*	Case No. 17-1226

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CORPORATE DISCLOSURE STATEMENT

Petitioner Hendrickson Trucking, Inc. makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

Answer: No.

2. Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

Answer: No.

ORAL ARGUMENT STATEMENT

Petitioner respectfully requests oral argument in this case. In light of the factual and legal complexity of the issues presented, oral argument will assist the Court in reaching a full and complete understanding of the issues and allow counsel to address any questions from the panel.

JURISDICTIONAL STATEMENT

Hendrickson Trucking, Inc. has petitioned the Court to review and set aside the National Labor Relations Board's ("the Board") October 11, 2017 Decision and Order in *Hendrickson Trucking, Inc. and Local 164 of the International Brotherhood of Teamers* No. 07-CA-086104 and 07-CA-09551, reported at 365 NLRB No. 139 (2017). The Board had subject matter jurisdiction pursuant to 29 U.S.C. §160(a). This Court has jurisdiction pursuant to 29 U.S.C. §160(f). Hendrickson Trucking, Inc. is a party to the decision, is aggrieved by the decision, and has standing to appeal. The petition for review filed on October 25, 2017 was timely filed because the National Labor Relations Act places no time limit on the institution of proceedings to review Board orders.

The Board has filed a Cross-Application for Enforcement of its Order. This Court has jurisdiction of the Cross-Application pursuant to 29 U.S.C. §160(e).

QUESTIONS PRESENTED FOR REVIEW

1. Was the Board's decision to credit the testimony of the Union that it asked for cost savings information at every bargaining session supported by substantial evidence on the record taken as a whole when the great weight of evidence shows the testimony to be untrue.

2. Was the Board's decision that the parties had not reached impasse supported by substantial evidence on the record as a whole where the Board's decision was based on its crediting of incredible testimony and its displeasure with a lawful proposal that the Company had made concerning arbitration.

3. Was the Board's decision that the parties had not reached impasse supported by substantial evidence on the record as a whole where undisputed evidence showed that the parties had regularly met, exchanged proposals, reached tentative agreements on most proposals, had presented each other with final proposals, with the Union's final proposal stating that it would strike were it not accepted.

4. Was the Board's decision that the strikers were unfair labor practice strikers as opposed to economic strikers when there was no underlying unfair labor practice and where the motivation for the strike was to support contract proposals supported by substantial evidence on the record as a whole.

5. Was the Board's decision that the Company committed an unfair labor practice by not providing the Union with information it had requested supported by substantial evidence on the record as a whole.

6. Was the Board's decision that the Company refused to meet with the Union supported by substantial evidence on the record as a whole where the undisputed testimony was that the Union refused to meet and that the Company made all the effort to arrange meetings.

7. Can the Board's Decision and Order be validly based on the Recommended Decision and Order of a person who was not properly appointed as an Administrative Law Judge and lacked lawful authority to conduct the unfair labor practice hearing.

STATEMENT OF THE CASE

A. The Procedural History

The unfair labor practice hearing in this case took place on May 21 and 22, 2013. The hearing was based on an amended unfair labor practice complaint which included the following basic allegations:

1. The Company prematurely declared impasse and implemented its contract proposal;
2. The Company failed and refused to meet with the Union;
3. The Company failed to provide certain requested information; and
4. The Company failed to reinstate strikers after they made an offer to return to work.

(See Amended Complaint).

The hearing was conducted by Administrative Law Judge Donna Dawson ("ALJ Dawson"). ALJ Dawson issued her first decision nearly one year after the hearing closed, on May 16, 2014. In, that decision ALJ Dawson found against the Company on every allegation of the complaint, and also found that the Company committed violations that were not alleged in the complaint.

The Company filed timely exceptions to the Board. Among the exceptions the Company raised was that ALJ Dawson lacked any authority to conduct the hearing or issue a decision because the Board approved her appointment at a time when it lacked a valid quorum and therefore was without authority to act pursuant to the Supreme Court's decision in *NLRB v Noel Canning*, 134 S.Ct. 2550 (2014).

On April 6, 2016 the Board issued its Decision and Order remanding this matter. In its Order, the Board conceded that Petitioner was correct in its argument that the Board lacked a valid quorum at the time it originally approved Judge Dawson's appointment in April 2013.

(Joint Appendix ("J.A.") Vol. I at A50-A52). The Board also held that its subsequent ratification of all administrative and personnel decisions made from January 4, 2012 through August 5, 2013 somehow cured the procedural deficiency. *Id.*

Not surprisingly, after the remand, by her Order Ratifying and Adopting Decision dated April 12, 2016, ALJ Dawson "rubber stamped" her first decision. (J.A. Vol. I. at A55-A56).

The Company filed timely exceptions to the ALJs ratification of her decision. On October 11, 2017 the Board issued its decision on those exceptions. (J.A. Vol. I at A57). While making some modification to ALJ Dawson's decision, the Board left intact her conclusions that the parties were not at impasse, that the strikers were unfair labor practice strikers entitled to reinstatement when they made their offer to return to work, and that the Company failed to provide certain information and refused the Union's request to meet and bargain. It is from this decision that this petition for review was made.

B. The Parties

The Company is a trucking company engaged in shipping of aggregate materials. (J.A. Vol. II at A347, ¶ 2). Tom Hendrickson was the Company's Vice President and Jack Durbrow, is its Treasurer. *(Id.* at ¶ 6).

Teamsters Local 164 ("The Union") is a labor organization, and since 1977 it has represented the Company's drivers and mechanics[1]. *(Id.* at ¶¶ 5,7).

The Company and Union have been parties to a series of collective-bargaining agreements, the most recent of which was effective from April 1, 2008 to March 31, 2012. (J.A. Vol. II at A348, ¶ 8).

[1] Local 164 is now defunct.

Alan Sprague was the Union's business agent. (J.A. Vol. I at A114). Tom Mathews served as the Union Steward and Recording Secretary. (J.A. Vol. I at A117).

In 2002, there were approximately fifty employees in the bargaining unit. By the summer of 2012, the unit consisted of approximately twenty employees. (J.A. Vol. I at A211).

C. The 2012 Negotiations

A significant issue in this case is whether the parties had reached a valid impasse when the Company implemented its final proposal. Therefore, a detailed account of the 2012 negotiations follows:

1. February 27, 2012 − Meeting

On January 4, 2012, the parties exchanged the notices required to initiate negotiations for a new contract. (J.A. Vol. I at A116, A137; J.A. Vol. II at A381, A382-A383).

On February 27, 2012, the Company and Union met to negotiate. (J.A. Vol. I at A117). Tom and Ryan Hendrickson, and Jack Durbrow attended the meeting for the Company, and Al Sprague and Tom Mathews attended for the Union. (J.A. Vol. I at A235). During this initial meeting, the parties presented their proposals to modify the existing contract. (J.A. Vol. I A117, A139; J.A. Vol. II at A384 – A396).

The Company's proposals were:

- Eliminate employer match for the 401(k) (J.A. Vol. I. at A119);
- Require a 25% contribution from the employees for health insurance premiums (J.A. Vol. I at A120);
- Calculate overtime with a 40-hour work week instead of an 8-hour day; and
- Eliminate the arbitration provision. (J.A. Vol. I at A127).

(J.A. Vol. II at A384-A394).

The Union's proposals were:

- Change to steward super seniority;
- Allow vacation selection before April 30th of each year;
- Year-round health insurance coverage;
- A tool allowance of $500 per year;
- Arbitration to be heard by Western Michigan Industrial Board; and
- Increase wage rates.

(J.A. Vol. II at A395-A396).

2. Review of Company's Financial Records by Union's Accountant

The Company agreed, upon the Union's request, to allow the Union's accountant to review the Company's financial records. (J.A. Vol. I at 129). Gary Kushner, the Union's accountant, and his assistant met with Jack Durbrow. (J.A. Vol. I at A272). The Company provided Mr. Kushner with six years of its tax returns. (*Id.*) Mr. Kushner did not request any other financial documents. (*Id.*)

On March 31, 2012, Mr. Kushner sent the Union his report. (J.A. Vol. I at A111, A136; J.A. Vol. II at A598-A602). The Union refused to provide the Company with a copy of this report. (J.A. Vol. I at A272-A273).

3. April 10, 2012 - Meeting

The Company and Union met for the second time on April 10, 2012 and reached several tentative agreements. (J.A. Vol. I at A139-A140; J.A. Vol. II at A397-A408).

The Company made concessions. For example, the Company agreed to the Union's proposal to delete the provision related to selection of vacation days and notice of vacation. (J.A. Vol. II at A401).

4. April 13, 2012 – Union Proposal

On April 13, 2012, Mr. Sprague faxed the Union's revised proposals to the Company. (J.A. Vol. I at A155; J.A. Vol. II at A409-A411). The proposals included:

- One-year contract;
- Freeze of wages;
- All healthcare premiums including the annual increase to be paid by the Company; and
- Contract to include all tentative agreements made at the April 10, 2012 meeting.

(J.A. Vol. II at A409-A411). The Union did not make any proposals regarding the Company's request to eliminate the 401(k) match or revise the overtime calculations. (*See Id.*).

5. April 25, 2012 - Meeting

The Company and Union met on April 25, 2012. During this meeting, the Company provided its updated proposals, which incorporated the parties' tentative agreements. (J.A. Vol. I at A159, A162; J.A. Vol. II at A412-A440). The Company also agreed to the Union's proposal on super seniority. (*Id.*).

The Company continued to request elimination of the 401(k) match and revision to the overtime calculation. (J.A. Vol. I at A236; J.A. Vol. II at A412-A440). The Company also amended its original proposal relating to healthcare contributions and reduced the employee contributions from 25 to 20 percent. (J.A. Vol. I at A159, A162; J.A. Vol. II at A421).

6. April 27, 2012 – Company Proposal

On April 27, 2012, the Company sent the Union its updated proposals, which incorporated the changes agreed upon to-date by the parties. (J.A. Vol. I at A162; J.A. Vol. II at A441-470). The parties, however, had not reached an agreement on the following proposals:

- Arbitration;
- 401(k);
- Overtime calculations; and
- Employee healthcare contributions.

(J.A. Vol. II at A441-A470).

7. The Union's Vote on the Company's Proposals

Mr. Sprague testified that on April 29 or 30, 2012, he presented the Bargaining Unit with the Company's proposals for a vote. (J.A. Vol. I at A163, A165). The employees voted to reject the Company's proposals. (J.A. Vol. I at A164).

Mr. Sprague also took a strike vote to determine whether the Bargaining Unit would strike. According to Mr. Sprague, the strike vote passed by an "overwhelming vote." (J.A. Vol. I at A164, A237-A238). The employees also voted to pre-ratify the Union's proposals. (J.A. Vol. I at A165).

8. May 1, 2012 - Meeting

On May 1, 2012, Mr. Sprague testified that he presented the pre-ratified proposals to the Company. (J.A. Vol. I at A166). Mr. Sprague and Tom Hendrickson had a conference, during which Mr. Sprague explained the Union's pre-ratified proposals. (*Id*.). The Company considered these proposals and rejected them. (J.A. Vol. I at A167).

9. May 16, 2012 - Meeting

On May 16, 2012, the parties met with Kevin Brahaney, a federal Mediator whom, the Company had requested. (J.A. Vol. I at A167-A168, A170, A239).

During this meeting Mr. Durbrow provided the Union with copies of a spreadsheet showing eight years of the Company's finances.[2] (J.A. Vol. I at A265, A269; J.A. Vol. II at A620).

According to the Company's records, the Company suffered a loss of $138,700 in 2011. (J.A. Vol. II at A620). Mr. Sprague's testimony also confirmed that during this meeting, he requested the specific cost-savings related to each of the Company's proposals. (J.A. Vol. I at A174, A222). Everyone, Company and Union witnesses alike, agreed that Mr. Durbrow informed the Union that $40,000 was attributable to health care, $25,000 was attributable to overtime, and $20,000 attributable to the 401(k) match. (J.A. Vol. I at A149, A241, A257-A261, A281).

During the May 16 meeting, Mr. Sprague stated that the "Union wasn't going to continually make concessions for this company if it looks like were [sic] losing – a losing company [sic] then maybe they should just close." (J.A. Vol. I at A270). Mr. Sprague even admitted: "[B]ecause I was upset and frustrated with everything that was going on, and I may have said, '**You know, maybe it's better off just close everything up and nobody has to work**.'" (J.A. Vol. II at A327)(emphasis added).

10. May 21, 2012 - Meeting

The parties met again with the mediator on May 21, 2012. (J.A. Vol. I at A170). This was their fifth in-person meeting, during which the Company presented its updated proposals. (J.A. Vol. I at A170, A178; J.A. Vol. II at A471-A477).

- Removal of arbitration in favor of court;

[2] Tom Hendrickson confirmed that the spreadsheet at J.A. Vol. II at A620 was provided to the Union at the May 16, 2012 meeting. (J.A. Vol. I at A309)

- Elimination of 401(k) match;
- Calculations after 40 hours; and
- Healthcare contributions from the employee.

(J.A. Vol. II at A471-A477; J.A. Vol. I at A170-A171, A240).

The Union, however, did not make any changes to its positions.

11. May 23, 2012 - Proposal

On May 23, 2012, the Company sent the Union its revised proposals that provided two options for the Union to consider and select:

- Option 1 – healthcare contributions from the employees would be 15 percent of the premiums for drivers and 13 percent of the premiums for mechanics; inclusion of the 180 day-waiting period for healthcare coverage for new hires; and elimination of 401(k) match.
- Option 2 – inclusion of the vacation selection and notice provisions; employee healthcare contributions would be reduced to approximately 10 percent; inclusion of 180 day-waiting period for healthcare coverage for new hires; reduction of the period of time employees that receive healthcare coverage following layoff to two weeks; and a reduction with the 401(k) match.

(J.A. Vol. I at A177-A178; J.A. Vol. II at A478-A485).

Around May 24 or 25, 2012, Mr. Sprague met with the Bargaining Unit and presented the Company's two options. The Union voted to reject both of those options and made no counter-proposal. (J.A. Vol. I at A177-A178).

12. May 30, 2012 Negotiations – Meeting

On May 30, 2012, the parties held their sixth in-person meeting. The Company presented its proposal for the new contract to become effective on Monday, June 4, 2013. (J.A. Vol. I at A181-A189; J.A. Vol. II at A486-A515).

The Company's proposals incorporated all tentative agreements and Option 1 from the May 23, 2012 proposals (*see* J.A. Vol. II at A478-A485), which included the following:

- Removal of arbitration;
- Elimination of 401(k) match;
- Revision to overtime calculations to a 40-hour work week; and
- Healthcare contributions of 15 percent of the premiums for drivers and 13 percent for mechanics.

(J.A. Vol. II at A486=A515).

The Union rejected the Company's offer and made no counter-proposal. (J.A. Vol. I at A180, A185).

D. Impasse

1. June 4, 2012

On June 4, 2012, the Company sent its last best and final offer to the Union for the new contract to become effective Monday, June 11, 2012. (J.A. Vol. II at A516-A579). The Company modified its proposal on arbitration. The final proposal allowed the parties to resort to "whatever judicial remedy may be available" after exhausting the grievance procedure. (*Id.*). The main proposals in dispute remained the same. Tom Hendrickson testified:

> At the mediation meeting held on May 30, 2012, the Company submitted you its last offer. You rejected our offer. We understand that the basis for your rejections is that you are unwilling to agree to our proposals on 401(k) contributions, health insurance, overtime, and the grievance procedure. **In fact, throughout our negotiations you have maintained your position that you are insisting that the language of the most recently expired agreement be continued on all of those subjects**.

Id. (emphasis added).

On June 8, 2012, Mr. Sprague rejected the Company's last best and final offer. (J.A. Vol. II at A580-A581).

2. The Company's Notice of Impasse

In a letter dated June 8, 2012 (with a fax date of June 11, 2012), Tom Hendrickson notified the Union of the Company's understanding that the parties had come to an impasse. (J.A. Vol. I at A184, A189; J.A. Vol. II at A516-A579).

3. June 13, 2012 – Meeting and the Union's Final Proposal

On June 13, 2012, the parties met for their seventh in-person meeting, during which the Union presented its proposal entitled "Final Proposal." (J.A. Vol. II at A582-A591; J.A. Vol. I at A191). When he presented this proposal, Mr. Sprague informed Mr. Hendrickson that the Company's final offer was voted upon and "**was completely unacceptable to the Union**." (J.A. Vol. I at A314) (emphasis added). Mr. Sprague also stated, "Here you go; this is our last final offer." (*Id.*)

The Union's final proposal stated:

Teamsters Local 164

Final Proposal

June 13, 2012

OPTION I

1. One (1) year contract extension
2. Employees shall contribute fifteen (15) dollars per week toward Health Care. Money shall be taken out of employees pay weekly on a pre-tax basis.

OPTION II

1. One (1) year contract extension
2. Employees shall contribute fifteen (15) dollars per week toward Health Care. Money shall be taken out of employees pay weekly on a pre-tax basis.
3. Add "OPT OUT" Health Care to CBA (copy attached)
4. Replace grievance procedure with the new language (copy attached)

OPTION III

1. ***Work Stoppage***

Indeed, Mr. Sprague testified that he informed the Company "**that there was no way that this was going to be – their offer was going to be accepted**." (J.A. Vol. I at A191) (emphasis added).

4. The Proposals that Resulted in Impasse

All four of the issues that separated the parties at the time they each provided their final offers involved cost savings. It should not be surprising that the Company was trying to save money. Admitted as Petitioner's [J.A. Vol. II at A620] is a spreadsheet which summarizes the Company's financial performance from 2004-2011. (J.A. Vol. I at A263-A307; J.A. Vol. II at A620). The Company lost money in all but two of those years. It lost $138,000.00 in 2011, the year immediately preceding the negotiations. It made $136,000 in 2010. (J.A. Vol. I at A307, J.A. Vol. II at A620). But that was only because there had been an oil spill in the area and the Company was awarded a profitable one-time job working on a superfund clean-up. (J.A. Vol. I at A212, A225).

Petitioner's Exhibit 31 was a summary based on business records. It was admitted without limitation. (J.A. Vol. I at A307). Did the ALJ rely on this document to make her findings regarding the Company's financial position? No, she relied on the Union's accountant's report. (J.A. Vol. I at A64). Here is how that document was offered and admitted:

> Ms. Fedewa: And your honor, I would move in GC-27 as to – not the truth of the matter asserted, but as to what [Mr. Sprague] relied upon in order to make his conclusions and do his bargaining.
>
> Mr. Ryan: In that case, no objection.

Thus, she relied on the truth of the matter asserted by a document that was specifically offered "not for the truth of the matter asserted." The ALJ also says the report was uncontroverted, but

at page 31 of the transcript Tom Hendrickson testified that it was inaccurate. (J.A. Vol. I at A111).

a. Elimination of the 401(k) Match

The Union acknowledged that the Company calculated a cost-savings of approximately $20,000 with eliminating the 401(k) match. (J.A. Vol. I at A174, A222). Mr. Durbrow testified that he computed the amount of payments made for the prior two years. (J.A. Vol. I at A281). Approximately eleven employees participated in the 401(k) program. (J.A. Vol. I at A302). The cost-savings also included eliminating the match for management. (J.A. Vol. A284).

During negotiations, the Company modified its original proposal of completely eliminating the 401(k) match to include language that the 401(k) match would be eliminated until the Company became profitable. (J.A. Vol. I at A257).

The Union, however, rejected any elimination of the 401(k) match throughout the course of negotiations, and it never made its own proposal pertaining to the 401(k). (*See, e.g.*, J.A. Vol. A184, A189; J.A. Vol. II at A582-A585). Indeed, Mr. Mathews testified that the "employees had had it with giving back." (J.A. Vol. I at A254).

b. Employee Healthcare Contributions and Opt-Out Language

The Union acknowledged that the Company calculated a cost-savings of approximately $40,000 with employee contributions toward their healthcare premiums. (J.A. Vol. I at A174, A222).

During the course of negotiations, the Company reduced its initial proposal on employee healthcare contributions from 25 percent to 15 percent. The Union continued to reject the 15-percent proposal. (J.A. Vol. I at A250-A251).

c. Overtime Calculations Based on 40-Hour Weeks

The Union acknowledged that the Company calculated a cost-savings of approximately $25,000 by calculating overtime with a 40-hour work week. (J.A. Vol. I at A174, A222). Mr. Durbrow calculated the cost-savings for overtime by reviewing the employees' time on the payroll system for the past couple of years and computing what their pay would have been with overtime after a 40-hour work week. (J.A. Vol. I at A282). The Union never agreed to the overtime proposal, nor did it make any counter-proposals on this issue.

d. Revision of the Grievance and Arbitration Procedure

The Company sought to keep the grievance procedure in the CBA the same and eliminate the arbitration provision. The Company wanted disputes settled in court. (J.A. Vol. I at A310). Tom Hendrickson, who is licensed to practice law in the State of Michigan, testified he believed that court would be more fair and cost-effective:

> Well, I felt like going to court would be a lot more simpler, it would be a lot more fair. There's electronic filing. There's teleconferences with the judges ... but there's teleconferences for status conferences, pretrials and different things which would mean that we wouldn't have to travel anyplace, so that's even cheaper yet, and the overall cost would be a lot less than just going to arbitration, and also if you weren't happy with the judge's decision, ultimately it could be appealed.

(J.A. Vol. I at A312). Mr. Sprague further acknowledged the reasoning behind the Company's proposal to eliminate the arbitration provision: "... [A]s counsel [Tom Hendrickson] felt that because he's an attorney, that I guess going to trial he could handle it better than with an arbitrator." (J.A. Vol. I at A129).

The Union, however, insisted on arbitration. (J.A. Vol. I at A311).

E. June 25, 2012 Strike

On June 25, 2012, the Union went on strike following the Company's implementation of its last proposal. (J.A. Vol. I at A194, A244). Mr. Mathews testified that the decision to strike was made by the Union on April 30, 2012 when the Union took its strike vote. (J.A. Vol. I at A244).

One of the members of the Union, Scott Hawkes, testified about the Union's demand to keep the status quo and the reasons for the strike:

> Q. And you knew you would be willing to strike to get what you wanted in the contract?
>
> A. We didn't want anything. We just didn't want anything taken away. We didn't ask for anything.
>
> Q. You were willing to strike to keep the old contract in force?
>
> A. Yes.

(J.A. Vol. I at A234).

F. Post-Impasse Meetings

1. July 26, 2012 Negotiation

On July 26, 2012, the parties met to discuss the Company's proposals and its implementation.[3]

This meeting was scheduled when Bill Bernard, the Union's Vice President, who was handling matters while Mr. Sprague was on medical leave, informed either Mr. Hendrickson or Mr. Durbrow that the Union was willing to meet. (J.A. Vol. I at A194-A195). Mr. Sprague testified that he instructed Mr. Bernard to schedule a meeting through the mediator. (J.A. Vol. I

[3] The parties stipulated that they had eight in-person meetings during the course of negotiations on the following dates: (1) February 27, 2012, (2) April 10, 2012, (3) April 25, 2012, (4) May 16, 2012, (5) May 21, 2012, (6) May 30, 2012, (7) June 13, 2012, and (8) July 26, 2012. (J.A. Vol. I at A227).

at A128). Mr. Mathews further testified that he later "sorted out" that neither party intended to ask for the July 26th meeting. (J.A. Vol. I at A253).

Thus, neither party presented any new proposals. (J.A. Vol. I at A252-A252, A255). The meeting concluded when both parties realized that neither intended to present any new proposals, and it had apparently been mistakenly convened.

2. The Union's November 30, 2012 Offer to Return to Work and the Company's Response

On November 30, 2012, Mr. Sprague sent the Company a letter indicating that the members of the Bargaining Unit were "unconditionally" offering to return to work on December 3, 2012. (J.A. Vol. II at A592; J.A. Vol. I at A201-A202). In a separate letter dated that same day, the Union also identified eleven members who were not intending to return. (J.A. Vol. I at A201, A203; J.A. Vol. II at A593).

The Union sent a third letter dated November 30, 2012 requesting to meet. (J.A. Vol. I at 201-A205; J.A. Vol. II at A594). The Union's letter conditioned its willingness to meet on the Company rescinding its implementation of its proposed contract and recalling the strikers. (*Id.*).

That same day, the Company responded to the Union's "unconditional" offer to return to work, informing the Union that there would be no work available for any returning strikers. (J.A. Vol. I at A198, A199; J.A. Vol. II at A595). Because it was entering the winter slow-down, the Company could complete its work with the permanent replacement employees. (J.A. Vol. II at A596). The Company also stated that the strikers who offered to return to work would be placed on a preferential hire/recall list based upon seniority. (*Id.*)

G. The Union's Information Requests And The Company's Response

1. Information Request Regarding AGG Trucking, LLC

On July 31, 2012, the Union sent the Company a grievance and 48 separate information requests related to another company, AGG Trucking. (J.A. Vol. II at A586-A591). The information requests mainly sought information pertaining to the corporate structure of AGG Trucking and its relationship to the Company and information pertaining to its employees. (J.A. Vol. I at A200). These requests also were similar to the 45 information requests sent by the Union on December 27, 2012. (J.A. Vol. II A586-A591; J.A. Vol. II at A603-A606).

During the strike, the Company used the name of AGG Trucking to disguise its trucks in an attempt to avoid its replacement drivers being harassed by strikers. (J.A. Vol. I at A313). Mr. Hendrickson testified that the drivers of the trucks were afraid that they would get into an accident while driving because the strikers were following the trucks and harassing the drivers. (*Id.*). Mr. Hendrickson admitted that the attempt "was a complete and utter failure." (*Id.*).

2. The Company's Response to the Information Requests

On January 9, 2013, Mr. Ryan, the Company's attorney, responded to both the July 31st and December 27th information requests. (J.A. Vol. I at A220, J.A. Vol. II at A607-A609).

> If the purpose of those questions is to gain evidence to establish that Hendrickson Trucking and AGG Trucking are a single employer, you should know that Hendrickson Trucking does not dispute that they are. Whether replacement drivers operated a truck that stated AGG or a truck that stated Hendrickson, they were always employed by Hendrickson and they were always paid by Hendrickson, so it appears that there cannot be any legitimate issue about the relationship between those entities.

(*Id.*). The response also provided, among other things, the names of the permanent replacement employees, their hire dates, the seniority list for the strikers, and the identity of the managers who performed work during the strike. (*Id.*).

3. The Union's Waiver of Any Alleged Obligation of the Company to Further Respond

On April 10, 2013, during the negotiations between the Company and the Union, which had ended, Mr. Ryan asked the Union's lawyer Mr. Canzano whether any information requests were still outstanding. (J.A. Vol. II at A322). Mr. Canzano responded that what the Union still requested was the Company's payroll information. (*Id.*). Mr. Ryan provided the payroll information to Mr. Canzano. (*Id.*).

Moreover, Mr. Mathews testified that that the Union no longer needed any information about AGG Trucking once it received the January 9, 2013 letter: "After I got the letter from him, no, I didn't need the information anymore, I don't believe." (J.A. Vol. I at A224).

H. The ALJ's Credibility Determinations

The facts recited above are undisputed. There are two areas of alleged factual disputes. The first is whether the Union asked at every bargaining session for the Company to provide it detailed financial information concerning its proposed cost savings and the Company failed to answer. The second factual dispute is not really a dispute at all. But the ALJ tried to manufacture one by crediting testimony that does not exist on the question of whether the Union declined to bargain in December of 2012.

1. The Company's Response to the Union's Questions About Cost Savings

At the hearing, for the very first time, the Union made the claim that it had asked for information on the cost savings the Company expected from its proposals and the Company never provided it.

While it was never charged as an unfair labor practice, and it is not alleged in the Complaint, the Board and the ALJ made it the centerpiece of their finding that the parties could not have been at impasse and that the strike was therefore an unfair labor practice strike. Indeed,

at page 27 of her Opinion, the ALJ specifically finds that the Company's failure to provide the requested financial information constituted separate violations of the National Labor Relations Act (the "Act"). Thus, the ALJ found a violation where one was never charged and concerning which no complaint was ever issued. The Board reversed the finding of a separate unfair labor practice on this point on the grounds that it was never alleged in the Complaint. (J.A. Vol. I at A58). However, the Board agreed with the ALJ that this alleged failure to provide the information provided a basis for finding that no valid impasse was reached. (*Id.*).

The ALJ's discussion on this point begins at page 24 of her Decision, and it appears under the heading "Respondent's Failure to Provide Information During Bargaining Precluded Impasse." Here is how the ALJ describes the information request on which she bases her conclusion that the Company failed to provide the requested information:

> The General Counsel alleges that Respondent failed to furnish it requested financial documentation to show how it reached its estimated cost savings totals for its newly proposed formula for employee contributions to health and welfare premiums, elimination of the 401(k) employer match, and revision of overtime calculations.[4]
>
> * * *
>
> While bargaining for a new contract in this case, the Union requested that Respondent furnish it with the calculations and financial information showing how it arrived at its cost saving totals for each of its proposals for the reduction in employer paid health and welfare premiums, elimination of the 401(k) employer match, and reduction in wages (overtime recalculated to begin after 40 hours rather than 8 hours).

To read the ALJ's Opinion, one would get the impression that there was evidence in the record to show that the Union made a specific and detailed request for financial data and documentation. Of course, there is no evidence to support that impression.

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[4] There is no such allegation.

The ALJ's decision to find an unfair labor practice on this topic, over which the Union never even filed a charge, is based on her decision to credit the Union's testimony over the testimony of Company. (J.A. Vol. I at A67). The competing testimony is as follows:

a. Union Testimony

The testimony of Mr. Sprague was that at every single bargaining session, the Union asked for the Company to provide "information," "comparisons," "numbers," "something" to show the cost savings that it attributed to each of its contract proposals. (J.A. Vol. I at A149-A150).

b. Company Testimony

The Company's testimony was that at one meeting Al Sprague asked how much cost savings the Company attributed to each of the three proposals – 401(k) reduction, the insurance provisions, and overtime. Mr. Sprague asked for the cost savings attributable to each of those items. Mr. Durbrow in response to the verbal question gave a verbal answer and told him that the Company estimated it would save $20,000 on the 401(k), $25,000 on insurance, and $40,000 on overtime. The Union was satisfied with the answer and never raised the issue again. It never asked for any other information concerning cost savings. (J.A. Vol. I at A280-A285).

c. Other Evidence Supporting the Company

Of course the ALJ credits the Union's version that Mr. Sprague asked for this information at every single meeting and it was never provided. The Board, as it usually does, approved the ALJ's finding without any independent analysis of the evidence. (J.A. Vol. I at A58). In crediting this testimony, the ALJ and the Board, without any sensible explanation, discredits the mountain of additional evidence in the record which shows that the Company's witnesses gave the accurate testimony on this point and the Union's did not. Here is the evidence that makes up that mountain:

1) Affidavit of Al Sprague

On August 14, 2012, Al Sprague gave his affidavit to the Board to support the unfair labor practice charges. That affidavit details the discussions that took place at each of the bargaining sessions. The only time Mr. Sprague's affidavit mentions any request that the Company provide information regarding the cost savings it intended to realize in its proposals was in his description of the May 30, 2012 bargaining session. There is no reference to any such request in Mr. Sprague's description of any of the other bargaining sessions. That's right. Mr. Sprague's affidavit to the Board is entirely consistent with the Company's testimony on this point and entirely inconsistent with his testimony. (J.A. Vol. I at A213-A215).

2) Affidavit of Thomas Matthews

Mr. Matthews also gave an affidavit to the Board. In that affidavit, he detailed what occurred in each of the negotiation sessions. Just like Mr. Sprague's the only reference in Mr. Matthews' affidavit to any request for information about cost savings was at the May 30, 2012 meeting. That's right. Mr. Matthews' affidavit is entirely consistent with the testimony of the Company's witness entirely inconsistent with the Union's witnesses. (J.A. Vol. I at A257-A261).

3) The Union's Bargaining Notes

Mr. Matthews' took the Union's notes at each of the bargaining sessions. He testified that he recorded what went on at each bargaining session so he could remember what occurred. (J.A. Vol. I at A258-A260). In Mr. Matthews' notes, just like in his and Mr. Sprague's affidavits, the only mention of any request for information concerning cost savings is at the May 30, 2012 bargaining session. That's right. The Union's bargaining notes are entirely consistent with the Company's testimony and entirely consistent with Mr. Sprague's and Mr. Matthews' affidavits, but entirely inconsistent with Mr. Sprague's and Mr. Matthews' testimonies. (*Id.*).

4) The Lack of a Written Request

This Union is not shy about requesting information. Mr. Sprague knows how to do it. J.A. Vol. II at A586, and J.A Vol. II at A603 are two written information requests he made. General Counsel's Exhibit 20 includes 48 separate itemized requests. Respondent's Exhibit 11 includes 45 separate itemized requests. This all demonstrates that when Mr. Sprague wants information he makes written requests and he does so in a detailed manner. The fact that there was no written request for the information that the Union says it continually asked for throughout negotiations is just one more strong indication that Mr. Sprague's affidavit, Mr. Matthews' affidavit, Mr. Matthews' bargaining notes, and the Company's testimony is accurate,.

5) There is no Unfair Labor Practice Charge

Mr. Sprague also knows how to file unfair labor practice charges. Counting the amendments, he did it five times in this case and two of those charges included allegations that the Company failed to provide requested information. (J.A. Vol. II at A331-A332). Yet the first time anyone raised this claim that the Union made repeated requests for information during bargaining, and that the Company refused to provide it, is when Mr. Sprague gave his testimony at the trial. The fact that this claim was never made until the trial is just one more strong indication that Mr. Matthews and Mr. Sprague testimonies are wrong, but their affidavits and bargaining notes are right.

2. The Union Refused to Bargain After December 2012

By letter dated November 30, 2012, Mr. Sprague offered to meet on the condition the Company recall the strikers to work and rescind its implemented offer. The Company's attorney, Mr. Ryan, spoke to Mr. Sprague by telephone about his offer to meet.

Here is Mr. Ryan's testimony about that phone call:

Q. And did you respond to Mr. Sprague about this letter? A. Yeah. Mr. Sprague and I had been involved quite extensively on some other matters for a different client of mine during the late summer/fall of 2012, and so we had been in regular contact I think during that period of time, so when I got this letter, 1 called him. I believe I called him. I know there was a telephone call. I assume I called him. He could have called me about something else, I don't know, but we were on the telephone, and I raised this 'letter with him, and I, if you read the letter basically, it offers, it says that the Union wants to meet and get some bargaining dates, but it also says that the Union is requesting that the Company call back permanent, call back strikers and that the Company re-implement its prior contract, you know, the Company had implemented its last proposal and this letter asks that it go back to the pre-implementation status quo. So during the telephone call I told Al we'd meet with him, but I wasn't clear whether you were saying you'll only meet with us if we do those two things or you'll meet with us anyway, but we weren't going to do either of those things, Hendrickson was not going to recall the strikers at that time, didn't have work for them and wasn't going to re-implement the old status quo. Mr. Sprague told me, he said, you know, there'd been an unfair labor practice charge, and that was the remedy, and we were going to have to do that anyway, and I said, "Well, we're going to, you know, have a trial over those issues I assume, and we're going," you know, our position is that we didn't have to do those things, but we weren't going to do them now, at that time. And Mr. Sprague then said, "Well, then just forget about it. We'll let the Labor Board figure it out," which I assume meant that he didn't want to bargain if we didn't do those two things.

Q. And when was this telephone call?

A. This call would have been shortly after I received the letter. I -- it would have been probably sometime during the week of the first week in December. This letter would have gotten to me shortly after November 30th, and I would have had my conversation with Al shortly thereafter.

(J.A. Vol. II at A316-A317).

The ALJ decided to credit Mr. Sprague's testimony over Mr. Ryan's concerning this call. (J.A. Vol. II at A80). Thus, one might assume that Mr. Sprague gave some contrary testimony. But one would be wrong. Here is Mr. Sprague's testimony:

> Judge Dawson: The question that I – I don't know a question that might be asked of the witness, maybe, you know, which hasn't been asked, I don't think, you know, are you saying the telephone conversation didn't exist or are you saying you didn't recall having a conversation, and that's all we need
>
> Mr. Ryan: Okay, then I'll ask that question.
>
> Judge Dawson: Okay.
>
> Question by Mr. Ryan: The conversation I talked about with you that I recall happening in December and you didn't recall.
>
> A: I remember not recalling.
>
> Q: Right. Are you saying it didn't happen or are you saying you don't recall?
>
> A: I don't recall.

(J.A. Vol. A221).

Thus, there was not any contrary testimony to credit. There were, however, three things Mr. Sprague did which corroborates Mr. Ryan's testimony. He sent separate letters to the Company dated December 11, 2012 (J.A. Vol. II at A597), and December 27, 2012 (J.A. Vol. II at A603-A606). He sent another letter to Mr. Ryan dated January 22, 2013. (J.A. Vol. II at A610-A611). All of these letters addressed issues related to collective bargaining, but none of these made any reference to meeting to negotiate or reiterated any request for dates. In other words, they are entirely consistent with Mr. Ryan's undisputed testimony that in early December 2012, Mr. Sprague declined to meet because the Company would not meet his pre-conditions.

Here are some additional undisputed facts which show that the Company was trying hard to arrange a meeting:

- In December 2012, the Union had initiated proceedings to remove Mr. Sprague from his position as President of the Local. (J.A. Vol. II at A318);
- In January 2013, Mr. Ryan made two calls to the Union office to try to arrange bargaining dates. On the second call, he spoke to Bill Bernard and was told that Mr. Bernard could not agree to a meeting. (J.A. Vol. II at A318-A319);
- In January 2013, Mr. Ryan contacted Patricia Fedewa, the Board Attorney assigned to this case to ask if she knew who he could contact about bargaining dates. (J.A. Vol. II at A319); and
- Based on Ms. Fedewa's recommendation, Mr. Ryan contacted the Union's attorney, John Canzano, in person, by telephone, and through e-mail all in an effort to schedule bargaining dates. (J.A. Vol. II at A319-A321; J.A. Vol. II at A612-A619).

The undisputed evidence is that there was only one person taking any initiative to try to resume bargaining. That was Mr. Ryan, the Company's lawyer. To come to the conclusion that the ALJ did on this issue requires that all of this undisputed evidence he ignored, and so that is exactly what she and the Board did.

SUMMARY OF ARGUMENT

On June 13, 2012, when both parties presented their last best and final offers, and the union gave notice of its intention to strike, the parties were at impasse. The Board's conclusion that the parties were not at an impasse is not supported by substantial evidence on the record as a whole because the great weight of the evidence shows that the Company provided all cost savings information that the Union requested. As a matter of law, the Board cannot base a finding of bad faith bargaining on its displeasure with one of the Company's contract proposals.

The strikers were economic strikers and not unfair labor practice strikers because there was no underlying unfair labor practice, and because the great weight of the evidence shows that it was the Company's contract proposals which motivated strike. Because the strikers were economic strikers they were not entitled to immediate reinstatement when they made their offer to return to work.

The Board's conclusion that the Company committed unfair labor practices by not providing the union requested information and by refusing to bargain is not supported by substantial evidence on the record as a whole because the undisputed evidence shows that the union was satisfied with the information the Company provided and the Company never refused to bargain but instead went to great lengths to arrange bargaining meetings.

At the time she conducted the unfair labor practice hearing Administrative Law Judge Dawson had no lawful authority to act. Her subsequent ratification of her unauthorized decision was the product of bias based on her unauthorized participation in the unauthorized hearing she conducted.

ARGUMENT

A. The Parties Had Reached a Valid Impasse

The first major issue in this case is whether the parties had reached a valid impasse. The ALJ found they had not based on her conclusion that the Company engaged in bad faith bargaining by not providing cost saving information and because she did not like its proposal on arbitration. The Board's reliance on these two items to uphold the ALJ's finding that no valid impasse had been reached is based on a twisted reading of the record and is contrary to law.

1. The Company Provided the Cost Savings Information

From pages 24-28, the ALJ provides her "analysis" for her conclusion that the Company failed to provide the Union requested information about its cost savings calculations during the

course of bargaining and thereby precluded a valid impasse. As discussed below, even if the events had happened just as the ALJ found them (that the Union asked for cost saving information and never got it), that would not preclude an impasse. But still, a critical issue to address, is her credibility resolution.

When an ALJ's credibility resolution is so thoroughly contrary to the evidence and is based on illogical and contradictory reasoning it should be reversed. The ALJ's credibility determinations are disregarded when they are "inherently unreasonable or self-contradictory." *NLRB v. Randall-Eastern Ambulance Service, Inc.*, 584 F2d 720, 730 (5th Cir. 1978).

In this case, testimony at the trial revealed two competing versions of what occurred. There was the Union's version that it asked for cost savings calculation data at every meeting and that it was only provided once, and the Company's testimony that the Union asked once and it was provided once.

Rarely has there been a case where there is so much other evidence that is so decidedly in support of one version over the other. Rarer still is it that all of that evidence would be produced by the party whose position it does not support. And even rarer still is it that a finder of fact has gone so far out of her way to disregard all of that evidence.

The Union's own affidavits and bargaining notes fully contradict the Union's version and fully support the Company's version. Let that sink in. These documents produced by the Union's witnesses not only entirely contradict the Union's position, they fully corroborate what the Company says happened.

But that's not all. This Union, which filed unfair labor practice charges five times never once mentioned any complaint about not providing cost cutting data in these charges. This

Union which submitted two written information requests with 48 and 45 detailed items respectively never once asked for this information in writing.

And why does the ALJ say she is going to disregard all of this evidence? The reason the ALJ credits Matthews and Sprague is "neither Matthews nor Sprague claim to recall all of the details or dates regarding the bargaining sessions …". That's right, the ALJ points to the Union's witnesses inability to recall details and dates as evidence that their testimony is credible. That's incredible. Then she says:

> "in fact notes taken by Sprague at a later session, and admitted into evidence, were sparse and clearly did not include all that was discussed when compared to the testimony of all the witnesses."

(J.A. Vol. I at A66). According to the ALJ, the fact that Mr. Sprague took "sparse notes," at a "later" bargaining session totally trumps both sworn affidavits and Mr. Matthews' contemporaneous bargaining notes. Sparse meeting notes at a July 26 bargaining session totally trumps the fact that the Union, in five tries, never once raised this issue when filing its unfair labor practice charges. Sparse meeting notes at a July 26 bargaining session totally trumps the fact that the Union which has a history of making written requests for information it wants never did so with regard to this issue. Not only do the sparse meeting notes, according to this ALJ, trump every one of those items, they trump all of them together.

In her decision, the ALJ makes the following statement:

> Finally, Respondent argues in its brief that the Union asked the cost savings information once during negotiations. I reject this argument since the Union is not required to repeat its request. Nor does the request have to be in writing.

(J.A. Vol. I at A75).

This misses the point entirely. The Company's position is not that it was not required to provide the information requested because the Union only asked once, or because the request

was not in writing. The Company's argument, based on the facts established mostly by the Union's own documentation, is that the Union asked once and the Company complied once and the Union never gave any indication that it wanted anything other than the information the Company provided. While the request does not have to be in writing, the fact that it was never put in writing bears on the credibility issue. Because the Union made other written requests for information, the fact that it did not do so this time is just one of the many strong pieces of evidence which show that things happened just as the Company says they did.

Any fair and reasoned analysis of the evidence can only lead to one conclusion – the Union asked once, the Company provided the information it asked for, and the Union never asked again.

2. The Company's Proposals did not Evidence Bad-Faith Bargaining

The Board is not supposed to second-guess the business judgment of the Company in making its proposals. The Company has the right to make them and can insist on them to impasse without violating the Act. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 409. The proper role and function of the NLRB is to act as a referee and to watch over the bargaining process and not dictate nor guarantee its results. *H. K. Porter v. NLRB*, 397 U.S. 99, 109, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970); *see also, Rescar Inc.*, 274 NLRB 1, 2 (1985), "[I]t is not the Board's role to sit in judgment of the substantive terms of bargaining, but rather to oversee the process to ascertain that the parties are making a sincere effort to reach agreement.")

The only proposal with which the ALJ and the Board take issue is the Company's proposal to have grievances ultimately decided in court. Here is the first reason the ALJ says this proposal evidences bad faith:

> Respondent offered several reasons for wanting to go to court versus arbitration, most of which defied logic. First, Respondent

> said that arbitration would be far more costly and less efficient than going to court.
>
> * * *
>
> Further. the proposal for a trial in court in lieu of arbitration is not only contrary to Respondent's goal to control costs, but it goes against generally accepted opinion that it is normally far less costly and expeditious to go to arbitration than to take a dispute into any type of court.

(J.A. Vol. II at A76-A77). Of course, there was no evidence to support what the ALJ called "generally accepted opinion" and her "analysis," totally misses the point. The reason court is expensive is because companies incur legal fees. In the Company's estimation, that would not be true here because Mr. Hendrickson is an employee of the Company, already on the payroll, licensed as an attorney to practice in federal and state courts in Michigan, and thus he could handle any court litigation without any extra cost. The cost that the Company would avoid by letting a court resolve disputes as opposed to an arbitrator is the cost of the arbitrator. The ALJ and the Board's reliance on some "generally" accepted opinion of which there is no evidence which does not remotely apply to the facts of this case is what defies logic here.

Then the ALJ cites *Collyer Insulated Wire*, 192 NLRB 837, 843 (1971) and *Steelworkers v. Warrior & Gulf Nay*, Co., 363 U.S. 578 (1960):

> Since arbitration has been deemed an essential part of collective bargaining [therefore], Respondent's demand to remove it. Along with its refusal to supply requested information, taints and frustrates the bargaining process.

(J.A. Vol. I at A77). Thus, the ALJ's decision is apparently based on her view that the Board and the Supreme Court have mandated arbitration in collective bargaining agreements. These cases do not say that. They only deal with the enforcement of agreed upon arbitration provisions.

Next, the ALJ states that the Petitioner's proposal on dispute resolution somehow amounts to a requirement that employees waive their right to file charges with the Board. The cases the she cites in support of this surprising finding had nothing to do with the facts here. For instance, she cites *Athey Products Corp*, 303 NLRB 92 (1991) in which the language specifically prohibited filing of a ULP charge.

The ALJ also cites *Isla Verde Hotel*, 259 NLRB 496 (1981) in support of this proposition. In that case, returning strikers were required to sign a letter waiving "any claim… with the agencies of the…federal government." In *Reichhold Chemicals*, 288 NLRB 69 (1988), the Board revised its prior position that a no strike clause could include a waiver of the right to access Board processes in connection with enforcement of the no strike clause. In *Retlaw Broadcasting Company*, 310 NLRB 984, the employer had conditioned reinstating an employee on the employee's agreement to waive any union representation in the future.

The dispute resolution procedure that the Company proposed here does not require employees to waive anything. With regard to the availability of the judicial remedy, it only states that the matter "may be submitted" to a court proceeding. The ALJ's attempt to stretch the cases she cites to fit the facts of this case is one more example of the faulty analysis she employs throughout.

None of the reasons for its proposals is "so illogical" as to warrant an inference that the Company attempted to frustrate bargaining by raising the proposals. The business reasons for the proposals are supported by record evidence and should not be second-guessed. As such, the Board cannot establish bad-faith bargaining based upon the Company's actual proposals.

B. The Company Bargained in Good Faith

Whether parties have bargained in good faith is determined by examining the "totality of the circumstances." *NLBR v. Suffield Academy*, 322 F.3d 196, 198 (2d Cir. 2003). In making this determination, the Board reviews whether the party has:

1) Engaged in delaying tactics;
2) Made unreasonable bargaining demands;
3) Made unilateral changes in mandatory subjects of bargaining;
4) Engaged in efforts to bypass the union;
5) Failed to designate an agent with sufficient bargaining authority;
6) Withdrew already agreed-upon provisions; and
7) Arbitrarily scheduled meetings.

Atlanta Hilton & Towers, 271 NLRB 1600, 1603 (1984).

Applying these factors here, the record evidence shows only good faith bargaining on the part of the Company. The parties began meeting on February 27, 2012 and continued to meet until impasse. During this timeframe, the Company:

- Negotiated on twelve occasions by meeting, telephone calls, and exchanging correspondence with proposals.
- Participated in seven in-person meetings with the Union before implementing its proposal.
- Provided the Union with seven proposals.
- Reached tentative agreement on almost all issues.
- Called in a mediator.
- Provided the Union with requested financial data including turning over its books to the Union accountant.
- Had its negotiating team of Tom Hendrickson, Ryan Hendrickson, and Jack Durbrow attend all in-person meetings, so the Company had full bargaining authority.

There is no evidence to suggest that the Company engaged in delay tactics during negotiations, arbitrarily scheduled these meetings, or engaged in efforts to bypass the Union.

Throughout the course of negotiations, the Company made concessions and revised certain proposals in the Union's favor. The Company agreed with the Union's proposals of eliminating super seniority and the vacation selection and notice provision. The Company revised its own proposals by reducing the proposed employee healthcare contributions including language that the 401(k) match would be eliminated until the Company became profitable; and including language that the parties could seek any court remedies to enforce the CBA (versus the requirement of filing in the United States District Court for the Eastern District of Michigan).

All of the factors weigh in the Company's favor. There is not really a serious argument that the Company bargained in bad faith.

C. The Company Lawfully Implemented Its Own Proposals After the Parties Reached True Impasse

The Company and the Union reached true impasse when, after good-faith bargaining, they were unable to resolve the proposals related to the elimination of the 401(k) match, employee healthcare contributions, revision to overtime calculations, and dispute resolution. Consequently, the Company could then implement its own proposals.

Impasse has been defined as "that point at which the parties have exhausted the prospects of concluding an agreement and further discussion would be fruitless." *Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n. 5 (1988); *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968) Put another way, impasse exists not simply when "the parties are *warranted* in assuming that further bargaining would be futile." *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd., 836 F.2d 289 (7th Cir. 1987) (emphasis added); *Pillowtex Corp.*, 241 NLRB 40, 46 (1979).

As of June 13, 2012, all of the following were true:

- The Union membership had approved a strike;
- Mr. Sprague had voiced his opinion that it might be better for the Company to close than to accept the Company proposals;
- The Company presented its last best final offer;
- Mr. Sprague informed the Company that its offer was "totally unacceptable" and that "there was no way" it was "going to be accepted."
- The Union presented its own final offer which stated that if the Company did not accept it, the Union would strike.

According to the ALJ, there was not really an impasse because the Union did not really mean it. (J.A. Vol. I at A69). Her decision is essentially that the Union harbored a secret willingness to move closer to the Company's proposal. (Id.) Since it approved the ALJ's decision, apparently the Board's new rule is that federal labor law requires an employer to disregard what a union does, what it says, and what it communicates in writing, and instead engage in some metaphysical exercise to determine what really is going on deep inside the minds of the union representatives. There is no case law to support that position.

It is also worth noting that this Union, which was secretly willing to move on its position could have done so at the July 26, 2012 meeting, but did not. In fact, it could have made a new proposal at any time, but it never did.

Perhaps the most telling undisputed facts in regards to the Union's state of mind on impasse is that on three of the four unresolved issues, the Union insisted on its own position from the very beginning without change. It insisted on arbitration, it insisted on overtime over eight hours, it insisted on no change to the 401(k). It never changed its position on any of those issues.

On the health insurance issue, it proposed a $15.00 co-pay on April 27, but then insistent it would go no further, and never did.

A case from this Court that is particularly instructive here is *Detroit Typographical Union 18 v. NLRB*, 216 Fed. 3d 109 (D.C. Cir. 2000). In that case, just like the here, the ALJ and the Board found that the employer's failure to provide requested information precluded an impasse. The Court held that a valid impasse had been reached and specifically requested the Board's presumption that any "unfair labor practice automatically precludes the possibility of meaningful negotiations and prevents the parties from reaching a good faith impasse." (*Id*. at 121). The presumption this Court rejected is exactly what the ALJ and Board applied here. Even if there had truly been a refusal to provide cost savings information and there was something wrong with the Company's arbitration proposal, there is no evidence and there was no analysis about how those things could have impacted bargaining.

D. The Company Did Not Refuse to Bargain in 2012

The fundamental flaws in the ALJ's credibility determination about the phone call Mr. Ryan had with Mr. Sprague in early December 2012 were detailed in the fact section of this brief and will not be repeated. Here are all of the undisputed facts about this allegation:

- During a telephone conversation in early December 2012, Mr. Sprague declined to meet and said he preferred to have the labor board decide.
- In January 2013, Mr. Ryan made two calls to the Union office to try to arrange bargaining dates. On the second call, he spoke to Bill Bernard and was told that Mr. Bernard could not agree to a meeting.
- In January 2013, Mr. Ryan contacted the Board Attorney assigned to this case to ask if she knew who he could contact about bargaining dates.

- Mr. Ryan contacted the Union's attorney, John Canzano, in person, by telephone, and through e-mail all in an effort to schedule bargaining dates.

The undisputed evidence is that there was only one person taking any initiative to try to resume bargaining. That was Mr. Ryan, the Company's lawyer.

E. The Strike Was An Economic One

Because the Company bargained in good faith and lawfully implemented its own proposals following impasse, and the strikers based their vote to strike on economic issues, the strikers engaged in an economic strike. Consequently, the Company lawfully hired permanent replacement employees and lawfully decided not to immediately reinstate the strikers upon their offer to return to work on November 30, 2012.

For an unfair labor practice strike to exist, there must be an underlying unfair labor practice committed by the employer. *Sunbelt Enterprises*, 285 NLRB 1153 (1987); *see also Blue & White Cabs*, 291 NLRB 1049, 1064 (1988). It is equally clear that there must be a *causal connection* between the alleged unfair labor practices and the strike itself in order to establish an unfair labor practice strike. As the Board has often stated:

> An unfair labor practice strike does not result merely because unfair labor practices precede the strike. Rather there must be a causal connection between the two events which demonstrates that the strike is the direct outcome of the unfair labor practices.

John Cuneo, Inc., 253 NLRB 1025, 1026 (1981), enfd., 681 F.2d 11 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1178 (1983); *Keller Mfg. Co.*, 272 NLRB 763 (1984).

It is axiomatic that employees must be aware of the unfair labor practice before a strike can be deemed an unfair labor practice strike. The Board often examines a union membership's consideration of issues at a strike vote in determining whether a strike is an unfair labor practice strike. In *Mobil Homes Estates, Inc.*, 259 NLRB 1384 (1982), enfd. on other grounds, 707 F.2d

264 (6th Cir. 1983), the administrative law judge found that prior to a strike, the employer committed several unfair labor practices including encouraging an employee to refrain from striking and attempting to encourage an employee to resign from the union. *Id.* at 1397. Nonetheless, the administrative law judge found the strike was economic because the unlawful statements were made the day before the strike began but after the strike votes had been held. *Id.* at 1402. The Board affirmed this decision.

Similarly, in *Facet Enterprises, Inc.*, 290 NLRB 152 (1988), enfd. on other grounds, 907 F.2d 963 (10th Cir. 1990), the Board found that a strike was not converted to an unfair labor practice strike based upon an unlawful bargaining proposal made by the employer before the strike. When the original strike vote was taken, the union's president handed out a list of unresolved issues, which did not mention the unlawful proposal. Based on these facts, the Board concluded that the strike was economic because the only grounds urged by the Union leadership for requesting the strike were economic. (*Id*. at 154).

In another case involving a strike vote meeting, the Board overruled the administrative law judge's finding of an unfair labor practice strike. In *Reichhold Chemicals*, 288 NLRB 69 (1988), *rev'd*, 906 F.2d 719 (D.C. Cir. 1990), *on remand*, 301 NLRB 706 (1991), the Board found that the employer committed an unfair labor practice by proposing a waiver of access to the Board by union members in its no-strike proposal. The Board noted the union conducted two strike votes and although contract proposals were discussed in detail, the waiver of access issue was not specifically mentioned. The Board rejected the union president's general discussion of the company's "unreasonable and outrageous" proposals as insufficient to establish that one of the reasons for the strike was the desire to protest the access proposal. In this regard, the Board said:

> ... the information on which the employees acted when they voted to strike is what is crucial in determining if there is a causal connection between the Respondent's insistence on a waiver of employees' rights to go to the Board and their determination to strike.

Id. at 73 (emphasis added).

Furthermore, in the context where the union knows its articulated reasons for striking will determine its members' recall rights, a finder of fact should carefully distinguish facts demonstrating true motivation from efforts by the union at revisionist history. *See C-Line Express*, 292 NLRB 63 (1989) ("[I]n examining the union's characterization of the purpose of the strike, the Board and the court must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context"); *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503 (4th Cir. 1998).

Here, the Union's strike vote was based solely on economic factors, and the Union never took another vote to continue its work stoppage because of any unfair labor practice. The only issues raised and considered when the Union voted to strike were the Company's proposals on the arbitration, 401(k) match, overtime, and employee healthcare contributions. (*See* J.A. Vol. I at A441-A470). In fact, one of the strikers, Scott Hawkes, testified about the reasons for the strike:

> Q. And you knew you would be willing to strike to get what you wanted in the contract?
>
> A. We didn't want anything. We just didn't want anything taken away. We didn't ask for anything.
>
> Q. You were willing to strike to keep the old contract in force?
>
> A. Yes.

(J.A. Vol. I at A234). His testimony as to the cause of the strike exclusively articulated economic reasons.

Because the evidence demonstrates that the Union's strike was purely based on its displeasure with the Company's proposals. The strikes were economic strikes and not entitled to immediate reinstatement.

F. The Company Sufficiently Responded To Information Requests

Here, the Company fully satisfied the Union's need for information set forth in the July 31, 2012 information requests. The Company responded to the Union's information requests related to AGG Trucking and the permanent replacement employees when the Company: 1) informed the Union that AGG Trucking and the Company were a single employer; 2) responded to the subsequent December 27, 2012 information requests on January 9, 2013 with information related to the permanent replacement employees (*see Id.*); and 3) provided Mr. Canzano with payroll information on April 10, 2013 (J.A. Vol. II at A322).

The Union acknowledged the sufficiency of these responses. Mr. Canzano only requested the payroll records when Mr. Ryan and Mr. Canzano discussed the outstanding information requests and the sufficiency of the responses; and those payroll records were produced. (*Id.*). More importantly, Mr. Mathews testified that that the Union no longer needed any information about AGG Trucking once it received Mr. Ryan's January 9, 2013 letter: "After I got the letter from him, no, I didn't need the information anymore, I don't believe." (*Id.*). *See e.g. Glaziers Wholesale Drug Co.*, 211 NLRB 1063 (1974) (noting that when an information request is rendered moot by subsequent events, the employer has no statutory obligation to furnish information).

Therefore, because the Union admitted that the Company sufficiently responded to its July 31, 2012 information requests, the Board cannot establish that the Company failed to respond.

G. The Remand To The ALJ Did Not Cure The Defect

In its decision in *National Labor Relations Board v. Noel Canning*, *supra*, the United States Supreme Court held that the three recess appointments President Obama made to the National Labor Relations Board on January 4, 2012 were invalid. The consequence of the Supreme Court's decision is that between January 4, 2012 and August 20, 2013, when the Senate confirmed the three nominees, the Board consisted of only two members and therefore was without any authority to act.

Pursuant to Section 4 of the NLRA, 29 U.S.C. § 154, the Board has the authority to appoint "examiners." Pursuant to Section 10(b) of the Act, 29 U.S.C. § 160(b), a hearing must be conducted by an "agent" of the Board. Pursuant to its rule making authority the Board has promulgated 20 CFR § 201 which states in relevant part:

> "The Board appoints administrative law judges and subject to the provisions of the Administrative Procedure Act Section 4(a) of the National Labor Relations Act, exercises authority over the division of judges."

Donna Dawson, the person who conducted the hearing, purported to act in the capacity of an Administrative Law Judge and issued the Decision and Recommended Order in this case was "appointed" on April 13, 2013. Thus, she was appointed at a time when the Board had only two members and no lawful authority to act.

As stated in *Indianapolis Glove Company*, 88 NLRB 986, 987 (1950), "[I]t is essential not only to avoid actual partiality and prejudgment... in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal. *See also*, *The New York Times Company*,

265 NLRB No. 45 (1982); *Filmation Associates, Inc.*, 227 NLRB 1721 (1977); *The Center for United Labor Action*, 209 NLRB 814 (1974). The proceedings in this matter fall far short of this standard.

It is undisputed in this case that at the time ALJ Dawson presided over this matter, she had no authority to do so. Lacking any authority, ALJ Dawson nonetheless conducted this hearing, reviewed evidence, made credibility determinations, and issued an opinion. The Company objected, and the Board's response was simply to send this matter back to the same ALJ for a rubber-stamp approval of her previous opinion. This does not cure the defective proceeding.

The Court in *Hannah v. Larche*, 363 U.S. 420, 442, 4 L. Ed. 2d 1307, 80 S. Ct. 1502 (1960) addressed the issue of partiality and prejudgment in administrative proceedings:

> Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.

The court concluded that quasi-judicial proceedings must entail, "at the very least," a fair trial, quoting *In re Murchison*, 349 U.S. 133, 136, 99 L. Ed. 942, 75 S. Ct. 623 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

In this matter, the ALJ did, in fact, predetermine the outcome before she was lawfully authorized to do so. Undoubtedly, she approached this matter with a "closed mind" after the remand, and would again if she presided over the new hearing. She has already demonstrated this by rubber-stamping her previous opinion with no consideration of the Company's arguments. In such cases, the Board must do what is necessary "to avoid even the appearance of

a partisan tribunal"—which includes removal of an ALJ. *Dayton Power & Light*, 267 NLRB 202, 203 (1983). In *Dayton Power*, the Board remanded a case to a different ALJ when it was clear the ALJ had already made up his mind about the merits of the case. *Id*. at 203-204. A similar result is warranted here. *See also, Distr. No. 1, Pacific Coast Engineers Beneficial Assoc.*, 274 NLRB 1481, 1481-1482 (1985) (Disqualification of ALJ appropriate where ALJ's conduct demonstrates hostility towards a party.)

Every code of conduct that governs judicial and quasi-judicial proceedings contains strong statements which reiterate the importance of maintaining the appearance of impartiality:

The Board's own statement of procedure demands another ALJ be appointed. NLRB 101.10(b) provides:

> "The functions of all administrative law judges and other Board agents or employees participating in decisions in conformity with section 8 of the Administrative Procedure Act (5 U.S.C. § 557) are conducted in an impartial manner and any such administrative law judge, agent, or employee may at any time withdraw if he or she deems himself or herself disqualified because of bias or prejudice…."

Application of the Model Code for Federal Administrative Law Judges leads to the same result. Canon 2(A) of the Model Code for Federal ALJs provides:

> An administrative law judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.

The commentary underscores the importance of adhering to this standard:

> Public confidence in the administrative judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on his or her conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Greenberg v. Board of Governors of the Federal Reserve, 968 F.2d 164, 167 (2d Cir. 1992).

The Code of Administrative Procedures mandated a different ALJ be appointed. 5 USC § 554(d)(2) provides in pertinent part:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this *title [5 USCS § 557*], except as witness or counsel in public proceeding.

The Board recognized in its decision to remand the case, that ALJ Dawson was not properly appointed and was not, therefore, authorized to hear this matter. Her resulting involvement amounts to an investigative function for the Board. Thus, she is precluded from subsequently recommending a decision or issuing one.

In an administrative forum, a showing of "actual bias" or "actual" partiality before recusal will be required. *Robbins v. Ong*, 452 F. Supp. 110, 116 (S.D. Ga. 1978) (citing *Megill v. Board of Regents of State of Florida*, 541 F.2d 1073, 1079 (5th Cir. 1976); *Caterpillar Inc*., 321 NLRB 1130, 1132-1134 (1996); *Detroit Newspapers*, 326 NLRB 700, 710 (1998). An ALJ may be disqualified where her previous, public statements reveal that she has "adjudged the facts as well as the law of a particular case in advance of hearing it" and "made up her mind about important and specific factual questions and . . . [is] impervious to contrary evidence." *Steelworkers v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) (citations omitted). The alleged bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp*., 384 U.S. 563, 583, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). Opinions formed from facts or events arising during the current or prior

proceedings are grounds for a recusal motion if they display deep-seated favoritism or antagonism. *See Liteky v. United States*, 510 U.S. 540, 556, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994); McClure, 456 U.S. at 195-96. Here, the hearing was in part was grievance proceeding at which AJL prejudged the case where she had not any authority

In this case, when ALJ Dawson "ratified" her decision, she was not acting as an impartial arbiter. Her mind had been made up, by the decision she rendered when she was without lawful authority to do so. Hendrickson Trucking was entitled to have its case heard before a lawfully appointed agent of the Board with an open mind. It has not had that yet.

II. CONCLUSION

For all of the foregoing reasons, Petitioner Hendrickson Trucking Company respectfully requests that its Petition for Review be granted and the Board's Application for Enforcement be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 3, 2018, the forgoing Petitioner's Opening Brief was submitted for filing with the Clerk of Court via ECF, with service electronically through the Court's ECF system on all registered counsel of record.

/s/Timothy J. Ryan

CERTIFICATE OF COMPLIANCE

I certify that this Petitioner's Opening Brief conforms to the requirements of FRAP 32(g)(1). The length of this Brief, not including the tables, and including this certificate of compliance and the certificate of service is 12512 words.

/s/Timothy J. Ryan

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